

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
AYSHEN LASTER,

Plaintiff,

-against-

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Appearances: -----x

For the Plaintiff:

CHARLES E. BINDER, ESQ.
485 Madison Avenue, Suite 501
New York, New York 10022

MEMORANDUM AND ORDER

Case No. 1: 19-cv-993-FB

For the Defendant:

RICHARD P. DONOGHUE, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East, 7th Floor
Brooklyn, New York 11201

BLOCK, Senior District Judge:

Ayshen Laster seeks review of the Commissioner of Social Security's denial of her application for social security disability benefits. Both parties move for judgment on the pleadings. For the following reasons, Laster's motion is granted, Commissioner's motion is denied, and the case is remanded for further proceedings.

I

Plaintiff filed an application for disability benefits on May 23, 2016. Her application was denied, and she requested a hearing before an ALJ. After the hearing, the ALJ ruled that plaintiff was not disabled. The ALJ assigned an RFC of:

sedentary work . . . except, during the course of an eight hour workday, she can sit for 6, stand/walk 2 hours and lift/carry 10 pounds occasionally. The claimant can never climb ladders/scaffolds; occasionally stoop, kneel, crouch and crawl; occasionally be exposed to extreme heat/cold and dust/odors; frequently handle and finger with the left dominant hand and never be around hazardous machinery.

AR 14. The Appeals Council declined review.

II.

“In reviewing a final decision of the Commissioner, a district court must determine whether the correct legal standards were applied and whether substantial evidence supports the decision.” *Butts v. Barnhart*, 388 F.3d 377, 384 (2d Cir. 2004); *see also* 42 U.S.C. § 405(g). “Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013) (internal quotation marks and alterations omitted) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

III.

Laster argues that the ALJ improperly afforded limited weight to the opinion of her treating physician—Dr. Hong Xu. Instead, the ALJ afforded weight to consultative examiner Dr. Andrea Pollack.

A treating physician’s opinion as to the nature and severity of an impairment is given controlling weight unless it is “[in]consistent with other substantial evidence in the record.” *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004). While treating physician opinions are subject to attack, “a circumstantial critique by non-

physicians, however thorough or responsible, must be overwhelmingly compelling in order to overcome a medical opinion.” *Wagner v. Sec'y of HHS*, 906 F.2d 856, 862 (2d Cir. 1990).

Dr. Xu opined that Lesser could sit for less than two hours and stand/walk for less than two hours. Dr. Pollack, without reviewing Lesser’s records and after meeting her once, opined that she had moderate restrictions in standing, walking, and sitting. *See Garretto v. Colvin*, 2017 WL 1131906, at *21 (S.D.N.Y. Mar. 27, 2017) (“[The consultant’s] use of the word ‘moderate’ is vague and provides no support for the ALJ’s conclusion that plaintiff engage in these activities for six hours out of an eight hour day.”). Dr. Pollack’s opinion is hardly “overwhelmingly compelling” considering Dr. Xu treated Lesser for years and performed blood tests and MRIs before forming her opinion. *Wagner*, 906 F.2d at 862.

Notably, however, the RFC contemplates plaintiff sitting for six hours a day. This is inconsistent with the opinions of both Dr. Xu and Dr. Pollack. In fact, the “six hours” figure does not come from a medical opinion in the record. Because the ALJ “improperly substituted his own opinion for that of a physician,” the Court finds the RFC determination legally deficient and unsupported by substantial evidence. *Hilsdorf v. Comm'r of Soc. Sec.*, 724 F. Supp. 2d 330, 347 (E.D.N.Y. 2010).

III.

For the foregoing reasons, Laster's motion is GRANTED and Commissioner's motion is DENIED, and the case is remanded for a new RFC determination in light of this memorandum and order.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
August 27, 2020